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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL SCOTT SHOOK,

Defendant and Appellant.

D072663

(Super. Ct. No. SCD270687)

APPEAL from a judgment of the Superior Court of San Diego County, Albert T. Harutunian III, Judge. Affirmed and remanded for resentencing.

Law Office of Christine M. Aros and Christine M. Aros, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Senior Assistant Attorney General, Melissa Mandel, Meredith White and Tami Falkenstein Hennick, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Michael Scott Shook of two counts of making criminal threats (Pen. Code,¹ § 422). He admitted allegations that he had suffered a prior serious felony conviction that qualified as a strike (§§ 667, subd. (a), 667, subds. (b)-(i), 1170.12). The trial court sentenced Shook to a total prison term of seven years eight months, consisting of 32 months (double the 16-month low term) on count 1, a concurrent 32-month term on count 2, and five years for his prior serious felony conviction. On appeal, Shook contended (1) insufficient evidence supported his criminal threat convictions in that there was no evidence his threat actually caused the victims to be in sustained fear for their own safety; and (2) the court prejudicially erred by refusing his request to instruct the jury on self-defense, an affirmative defense to the criminal threat charges, because substantial evidence warranted the instruction. Rejecting these contentions, we affirmed the judgment.

The California Supreme Court granted Shook's petition for review and transferred the case to us with directions to vacate our decision and reconsider the matter in light of Senate Bill No. 1393 (2017-2018 Reg. Sess.; Stats. 2018, ch. 1013). That law, effective January 1, 2019, amends sections 667 and 1385 to give trial courts new discretion to strike or dismiss a five-year prior serious felony enhancement imposed under section 667, subdivision (a).

In accordance with the California Supreme Court's order, we vacate our September 10, 2018 opinion and reconsider the cause in light of Senate Bill No. 1393. Having done

¹ Undesignated statutory references are to the Penal Code.

so, we again affirm the convictions but remand the matter for resentencing so that if Shook files an appropriate motion, the trial court can exercise its newly granted discretion to determine whether to strike Shook's five-year serious felony enhancement.

FACTUAL AND PROCEDURAL BACKGROUND

In February 2017, J.D., a security agent at UCSD medical center, received a call about a disruptive patient at the medical center's emergency department. When J.D. arrived there, he noticed Shook was having a confrontation with another person and a staff member was telling Shook he needed to leave the waiting area. J.D. asked Shook to leave and followed Shook as he began to depart. While they were walking out of the emergency department, Shook, who was very angry, aggressive and using profanities, told J.D., "I'm going to kick your ass if I see you outside this place." For safety reasons due to Shook's threat, J.D. called another security agent as backup.

A second agent, L.F., responded to J.D.'s call. As she approached, she heard screaming and saw that J.D. was asking her for her taser. L.F. handed J.D. her taser and the agents continued to walk with Shook to his vehicle. As Shook walked, he told both agents he was going to "kick [their] asses." Shook also said in a "very, very angry" way: "I'm going to get a gun and shoot both of you"² then darted to the back of his vehicle and

² L.F. testified that Shook said, "I'm going to fucking shoot both of you." A transcript of a responding police officer's body worn camera shows that L.F. told the officer that she heard Shook say, "I'm gonna get my gun if you come near me" J.D. testified at trial that that Shook never said he was going to get his gun if J.D. came near him with the taser.

opened his trunk. J.D. felt threatened. J.D. took the threat very seriously given Shook's conduct in the emergency department as well as the fact J.D. did not know if Shook really had a weapon, Shook had not calmed down but was still very angry the entire time, he was making multiple threats, and he seemed very serious with the intent to harm. L.F. felt threatened and afraid; she was afraid that Shook had a gun and was going to shoot them. J.D. assumed Shook was going to get a weapon, so he used L.F.'s taser and drew it on Shook, telling him to stop or he would be tased. As J.D. approached Shook and was within a couple of feet from him, J.D. thought he might be shot, but felt it was the best option to stop Shook.³ Shook stopped, but then ran alongside the passenger side of his car to flee. He tripped and fell to the ground. The agents instructed Shook to stay on the ground with his hands visible. They arranged to contact San Diego police. J.D. still did not know if Shook had a weapon.

While on the ground, Shook continued to use profanity and threaten to "kick [the agents'] ass." He also tried to command his dog, who was in the passenger seat of his vehicle, to attack the agents, who by then had been joined by a third agent. J.D. and L.F. saw that Shook's car window was open and the dog was barking, and they were concerned because it seemed possible the dog would jump out of the car. Even though he had a taser pointed at Shook, J.D. remained concerned because of Shook's prior threats

³ The prosecutor asked: "You mentioned that you were fearful and that you took the threat very seriously. Why did you then go and approach Mr. Shook with a taser?" J.D. answered: "I feel it was the best option at that point. I didn't really have a whole lot of cover, and I felt like I had a better chance at stopping it like that by approaching him and beating him to the punch, so to speak."

and his attempt to get his dog to attack the agents. J.D. did not know if Shook was "still going to try something." While Shook was on the ground commanding his dog, L.F. was still "kind of afraid," but she knew other agents were responding.

DISCUSSION

I. *Shook's Criminal Threat Convictions Are Supported by Substantial Evidence*

A. *Legal Principles and Appellate Standard of Review*

"To prove a violation of section 422, the prosecution must prove ' "(1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat—which may be 'made verbally, in writing, or by means of an electronic communication device'—was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances." ' "

(*People v. Culbert* (2013) 218 Cal.App.4th 184, 189, quoting *In re George T.* (2004) 33 Cal.4th 620, 630.)⁴

⁴ Subdivision (a) of section 422 prohibits " 'willfully threaten[ing] to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement . . . is to be taken as a threat . . . which, on its face and under the

Sustained fear refers to a state of mind; the word fear "describes the emotion the victim experiences." (*People v. Fierro* (2010) 180 Cal.App.4th 1342, 1349.) This element "is satisfied where there is evidence that the victim's fear is more than fleeting, momentary or transitory" (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156); it may be found when the evidence shows the victim's fear is not " 'instantly over.' " (*People v. Culbert, supra*, 218 Cal.App.4th at p. 191.) No specific time period is required; even one minute of fear can be sustained if a person is confronted with what he believes is a deadly weapon and believes he is about to die. (*People v. Fierro*, at p. 1349 ["we believe that the minute during which [the victim] heard the threat and saw [appellant's] weapon qualifies as 'sustained' under the statute. When one believes he is about to die, a minute is longer than 'momentary, fleeting, or transitory' "].)

Under the substantial evidence standard of review, this court reviews the entire record in the light most favorable to the judgment to determine whether it contains " 'evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find [the elements of the crime] beyond a reasonable doubt.' " (*In re George T., supra*, 33 Cal.4th at pp. 630-631; see also *People v. Harris* (2013) 57 Cal.4th 804, 849; *People v. Lee* (2011) 51 Cal.4th 620, 632.) We presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*People*

circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety.' " (*People v. Chandler* (2014) 60 Cal.4th 508, 511.)

v. Thompson (2010) 49 Cal.4th 79, 113.) " 'Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence.' " (*People v. Lee*, at p. 632.) " ' " 'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.' " ' " (*In re George T.*, at pp. 630-631.) The standard applies whether direct or circumstantial evidence is involved. (*People v. Thompson*, at p. 113.) "[A]ll of the surrounding circumstances should be taken into account to determine if a threat falls within the proscription of section 422." (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1013.)

B. *Analysis*

Shook contends the evidence was insufficient for the jury to find that J.D. and L.F. actually feared for their own safety or that any such fear was sustained. He points out J.D. only testified he "felt threatened" and did not exhibit fear in that J.D. actually chased him with the taser rather than run away or seek cover. He also claims J.D. testified he did not believe Shook had a weapon at the time Shook threatened him. As for L.F., Shook argues the evidence showed she followed J.D. despite not having a taser, and she was calm and talking to her coworkers when police arrived, indicating that any fear she suffered was only fleeting or transitory.

Having reviewed J.D.'s and L.F.'s testimony and assessing the reasonable inferences that may be drawn from it in favor of the jury's verdicts, we have no difficulty concluding that it established they experienced sustained fear for their own safety when Shook made his threat to shoot them at least to the point when he was on the ground. J.D. had already been subjected to Shook's anger and threats to "kick [J.D.'s] ass." Both agents were the recipients of Shook's threat to get a gun and shoot them while he was approaching his vehicle, and he appeared to be acting on his threat when he darted to his trunk and opened it, causing both agents to feel threatened and fearful that he would retrieve a gun and use it on them. L.F. testified she remained afraid while she followed J.D. as he approached Shook with the taser, and was still fearful when he was on the ground commanding his dog.

That J.D. did not expressly use the words "fearful" or "afraid" is of no moment, when his objective actions in calling for backup "for safety reasons" and pointing the taser permitted the jury to conclude that he reasonably feared for his personal safety having seen Shook's escalating agitated and threatening behavior. J.D. did not deny being fearful when the prosecutor characterized his reaction when questioning him about Shook's threat. Further, J.D. stated he was still concerned that Shook may have possessed a weapon even after he fell to the ground. That J.D. called police shows his fear for his safety lasted more than a few minutes, a sufficient period of time to meet that element of the criminal threat offense.

Shook's recitation of the evidence views it in the light most favorable to him, which misapplies the substantial evidence standard of review. Shook's arguments in part

also mischaracterize the record, which shows J.D. testified he saw Shook had something in his hands, and while he did not believe it was a weapon, he did not really know what it was. Shook asserts that L.F. testified she experienced no lasting fear or discomfort. In fact, L.F. was asked on the stand whether, as she looked back on the situation *at the time of trial*, it still caused her fear or discomfort; she responded, "Not really," because "it happened a while back" and she "got over it." She was then asked whether the incident was "difficult to get over" or whether it was something she thought about; L.F. responded, "I did for a while" since it "was like the first time that I've been in a serious situation like that." The testimony permits an inference in favor of the jury's verdict that L.F. did in fact have difficulty getting over the incident, and supports the jury's finding that Shook's actions caused L.F. to experience more than fleeting or transitory fear.

II. *Claim of Instructional Error*

Shook contends the trial court erred by refusing his request that the jury be instructed with CALCRIM No. 3470 on self-defense, which he asserts is an affirmative defense to criminal threat offenses.⁵ We need not decide whether self-defense is a legal

⁵ CALCRIM No. 3470 addresses the right of self-defense in a nonhomicide case and provides in part: "Self-defense is a defense to <insert list of pertinent crimes charged>. The defendant is not guilty of (that/those crime[s]) if (he/she) used force against the other person in lawful (self-defense/ [or] defense of another). The defendant acted in lawful (self-defense/ [or] defense of another) if: [¶] 1. The defendant reasonably believed that (he/she/ [or] someone else/ [or] <insert name of third party>) was in imminent danger of suffering bodily injury [or was in imminent danger of being touched unlawfully]; [¶] 2. The defendant reasonably believed that the immediate use of force was necessary to defend against that danger; [¶] AND [¶] 3. The defendant used no more force than was reasonably necessary to defend against that danger. [¶] Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to

defense to the offense of making a criminal threat. Assuming *arguendo* it is, the court was under no obligation to provide such an instruction unless the defense was supported by substantial evidence, that is, evidence " 'sufficient to "deserve consideration by the jury," ' " or " 'evidence that a reasonable jury could find persuasive.' " (*People v. Landry* (2016) 2 Cal.5th 52, 120.) If the evidence is speculative, minimal or insubstantial, the court need not instruct on its effect. (*People v. Simon* (2016) 1 Cal.5th 98, 133; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1180.) We review *de novo* a court's decision not to give a requested instruction. (See *People v. Manriquez* (2005) 37 Cal.4th 547, 581; *People v. Quarles* (2018) 25 Cal.App.5th 631, 634; *People v. Oropeza* (2007) 151 Cal.App.4th 73, 78.)

"To justify an act of self-defense . . . , the defendant must have an honest *and reasonable* belief that bodily injury is about to be inflicted on him." (*People v. Goins* (1991) 228 Cal.App.3d 511, 516; see *People v. Minifie* (1996) 13 Cal.4th 1055, 1064; *People v. Wilson* (1976) 62 Cal.App.3d 370, 374 ["To justify an act of self-defense, the jury must conclude that defendant 'was actually in fear of his life or serious bodily injury and that the conduct of the other party was such as to produce that state of mind in a reasonable person' "].) The threat of bodily injury must be imminent, and any right of

be. The defendant must have believed there was (imminent danger of bodily injury to (himself/herself/ [or] someone else)/[or] an imminent danger that (he/she/[or] someone else) would be touched unlawfully). Defendant's belief must have been reasonable and (he/she) must have acted because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the defendant did not act in lawful (self-defense/ [or] defense of another)." (CALCRIM No. 3470.)

self-defense is limited to the use of such force as is reasonable under the circumstances. (*Minifie*, at pp. 1064-1065.) The reasonableness requirement "is determined from the point of view of a reasonable person in the defendant's position." (*Minifie*, at p. 1065.) A defendant does not have the right to self-defense if through his own wrongful conduct he has created circumstances under which his adversary's attack or pursuit is legally justified. (*In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1; cf. *People v. Lousaunau* (1986) 181 Cal.App.3d 163, 170 ["When a burglar kills in the commission of a burglary, he cannot claim self-defense, for this would be fundamentally inconsistent with the very purpose of the felony-murder rule"].)

Shook argued below that the instruction was warranted because the evidence showed he only made his threat to retrieve his gun and shoot the agents after becoming aware of the existence of the taser. He makes a similar argument on appeal, asserting that when "outnumbered and confronted by two security guards, one of whom was armed with a taser, [he] could have reasonably believed or feared that bodily injury was about to be inflicted upon him." This assertion is not supported by the record, which indicates the security guards were merely escorting an angry and agitated Shook out of the emergency department, following him off the premises to his vehicle.⁶ Even assuming the taser was

⁶ Shook points to a photograph from surveillance footage showing L.F. with her hands outstretched in front of her coming out of the hospital. But Shook's counsel characterized that still photograph as showing L.F. "coming towards *the area where my client is standing*, holding her hand stretched in front of her." When shown the surveillance footage, L.F. agreed she was "crossing the street toward [J.D. and Shook]" with her taser. There is no indication that the photograph showed L.F. confronting Shook

visible to Shook at the time L.F. handed it to J.D., there is no other evidence from which we can conclude a reasonable person in Shook's position would *actually* perceive an imminent life-threatening or serious-injury-producing attack from either J.D. or L.F. at that time. (Accord, *People v. Stitely* (2005) 35 Cal.4th 514, 551-552 [no evidence of " 'actual fear of imminent harm' " to support self-defense instructions where defendant's statements about the murder victim's possession of a knife were that the victim pulled the knife to protect herself from another person, and defendant maintained she showed no interest in using the knife against him nor did she threaten him with it].)

We reject Shook's argument that the jury was entitled to consider the issue of self-defense because the reasonableness of his belief or fear was a factual matter for the jury. For that proposition he cites *People v. Lemus* (1988) 203 Cal.App.3d 470, in which this court held the defendant's testimony provided sufficient evidence to warrant a self-defense instruction. (*Id.* at p. 477.) In *Lemus*, the defendant's trial testimony was in direct conflict with the prosecution's evidence; the trial court in denying the instruction had assessed the defendant's testimony was not credible, but this court pointed out it was the jury's, not the trial court's, exclusive function to assess witness credibility. (*Id.* at p. 477.) Our holding, contrary to *Lemus*, is not based on credibility determinations, we conclude the trial evidence even drawing all inferences in Shook's favor does not permit a conclusion that he reasonably believed he was in imminent danger of suffering bodily

with the taser, pointing it at him, threatening him, or in any position to actually touch him with it.

injury while the agents followed him to his vehicle, justifying his threat to get his gun and shoot them.

Furthermore, viewing the evidence in the light most favorable to Shook, it shows that J.D. only asked for L.F.'s taser after Shook had angrily threatened to "kick [his] ass" if he saw him outside the emergency department, and J.D. did not train it on Shook until after Shook lunged for his car trunk after threatening to get his gun and shoot the security agents. As the People point out, Shook created the circumstances that caused the agents to react in the way they did to protect themselves; on this record, self-defense was not available to Shook.

III. *Section 667, Subdivision (a) Five-Year Enhancement*

As summarized above, the trial court imposed a five-year prior serious felony enhancement pursuant to section 667, subdivision (a). At the time the trial court sentenced Shook, section 1385 did not authorize a trial court to strike or dismiss such an enhancement. (Former § 1385, subd. (b) ["This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667"].) Effective January 1, 2019, however, Senate Bill No. 1393 amended sections 667 and 1385, deleting the provisions in those statutes that prohibited a trial judge from striking a section 667 prior serious felony conviction enhancement in furtherance of justice. (Stats. 2018, ch. 1013, §§ 1-2.)⁷

⁷ Former section 667, subdivision (a) had provided in part: "In compliance with subdivision (b) of Section 1385, any person convicted of a serious felony who previously has been convicted of a serious felony . . . , shall receive, in addition to the sentence

In *People v. Garcia* (2018) 28 Cal.App.5th 961, our colleagues in Division Two of this District recognized that when an amendatory statute gives a trial court discretion to impose either the same penalty as under the former law or a lesser penalty, "it is reasonable for courts to infer, absent evidence to the contrary and as a matter of statutory construction, that the Legislature intended the statute to retroactively apply to the fullest extent constitutionally permissible—that is, to all cases not final when the statute becomes effective." (*Id.* at p. 972, citing *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 307-308 & fn. 5 & *People v. Francis* (1969) 71 Cal.2d 66, 76.) *Garcia* held that because Senate Bill No. 1393 is ameliorative legislation that vests trial courts with such discretion, and there was no indication the Legislature did not intend retroactive application, "it is appropriate to infer, as a matter of statutory construction, that the Legislature intended [Senate Bill No.] 1393 to apply . . . to all cases not yet final when [Senate Bill No.] 1393 becomes effective on January 1, 2019." (*Garcia*, at p. 973.) We agree with *Garcia*'s analysis and conclusion.

" [W]hen the record shows that the trial court proceeded with sentencing on

imposed by the court for the present offense, a five-year enhancement for each such prior conviction" Senate Bill No. 1393 amended section 667, subdivision (a) by deleting the words, "In compliance with subdivision (b) of Section 1385." It amended section 1385, subdivision (b) to provide: "(1) If the court has the authority pursuant to subdivision (a) to strike or dismiss an enhancement, the court may instead strike the additional punishment for that enhancement in the furtherance of justice in compliance with subdivision (a). [¶] (2) This subdivision does not authorize the court to strike the additional punishment for any enhancement that cannot be stricken or dismissed pursuant to subdivision (a)." (Stats. 2018, ch. 1013, §§ 1-2.)

the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing.' " (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) At Shook's sentencing hearing, the prosecutor stated, "It's mandatory that the court imposes five years under [section] 667[, subdivision] (a)," additionally remarking, "There's nothing that the court can do about that." The court thus imposed the five year additional term, which it found "militates in favor of selecting the low term for the base term." This is a case where the court understood it had no discretion, and therefore the case must be remanded for it to permit Shook to move to dismiss the serious felony prior conviction and exercise its discretion to either impose or strike the serious felony enhancement.

DISPOSITION

Our prior decision is vacated. The sentence is vacated and the matter remanded to the trial court with directions to permit Shook to bring a motion to dismiss the serious felony prior conviction (section 667, subdivision (a)(1)) in light of Senate Bill No. 1393, and to exercise its discretion as may be appropriate. If the prior conviction is dismissed the court shall resentence Shook accordingly. If the prior conviction is not dismissed the previous sentence shall be reinstated. In all other respects, the judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.